

BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF: [REDACTED]

Petitioners,
VS.

OAK RIDGE SCHOOL SYSTEM,
Respondent.

No. 04-24

FINAL ORDER

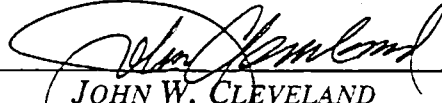
This case came to be heard on October 7, 2004, before John W. Cleveland, Administrative Law Judge, on the Petitioners' due process hearing request, the testimony of witnesses, the exhibits filed by the parties and the record as a whole, from all of which the Administrative Law Judge makes the findings of fact and reaches the conclusions of law set forth in his Memorandum Opinion, which is filed herewith and incorporated herein by reference as fully and completely as if set forth verbatim.

IT IS THEREFORE ORDERED as follows:

1. Oak Ridge School System shall provide psychotherapy to its student, [REDACTED] in order for [REDACTED] to receive an appropriate special education and other required related services in a regular education middle school, and to his mother, [REDACTED] to assist [REDACTED] in developing skills needed to benefit from special education and to correct conditions which interfere with his progress toward the goals and objectives listed in his IEP.
2. Oak Ridge School System shall promptly convene an IEP Team meeting to modify IEP to conform to the requirements of this Order and carry them into effect.

4. Within sixty (60) days from the date of this Order, the local education agency shall render in writing to the District Team Leader and the Office of Compliance, Division of Special Education, a statement of compliance with the provisions of this Order.

ENTER this 3rd day of February, 2005.


JOHN W. CLEVELAND
Administrative Law Judge

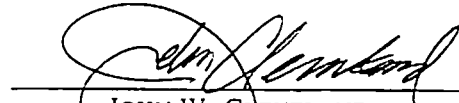
NOTICE

Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the District in which the School System is located. Such appeal or review must be sought within sixty (60) days of the date of entry of this Final Order. In appropriate cases, the reviewing Court may order that this Final Order be stayed.

If a determination of a hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by a proceeding in the Chancery or Circuit Court under provisions of *Tenn. Code Anno.* §49-10-601.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Memorandum Opinion and Final Order filed in this case were served upon all adverse parties at interest in this case or their counsel of record by placing a true copy of same in the United States Mail, addressed to said parties or their counsel at their offices, with sufficient postage thereon to carry the same to its destination, *to-wit*: Mr. William Allen, *Esq.*, MOSTOLLER, STULBERG & WHITFIELD, 136 S. Illinois Avenue, Suite 104, Oak Ridge, Tennessee 37830; Mr. Lenny Croce, *Esq.*, LEGAL AID SOCIETY, Post Office Box 5209, Oak Ridge, Tennessee 37831; and Mr. James Webster, Attorney at Law, 107 N. Charles G. Seivers Blvd., Clinton, Tennessee 37716, on February 3, 2005.


JOHN W. CLEVELAND
Administrative Law Judge

MEMORANDUM OPINION
No. 04-24

This cause came to be heard on October 7, 2004, before the Honorable John W. Cleveland, Administrative Law Judge for the Tennessee Department of Education, upon the Due Process Hearing Request filed by the Parents, the testimony of witnesses and the exhibits filed by the parties. The Petitioners and Respondent were present, and both were represented by counsel.

Identifying information appears on the cover page of this Opinion and on the Final Order, which incorporates, and is filed with, this Opinion. To preserve the parties' privacy in compliance with the Federal Educational Right to Privacy Act ("FERPA")¹, the parties, the schools, the witnesses and other identifying information are referred to by general descriptions, *e.g.*, the "Student," the "School," the "Supervisor of Special Education." Publication of the cover page of this Memorandum Opinion and Final Order, the Final Order or other identifying information violates federal law.

References to the record of the due process hearing in this matter appear in endnotes on the last five numbered pages, *i.e.*, Exhibit 3, Transcript 69, which do not contain identifying information, and may be published with this Memorandum Opinion, in the user's discretion.

PROCEDURAL HISTORY

On April 2, 2004, Student's Mother filed a Due Process Hearing Request after the School System suspended Student for making false accusations against a teacher at his school. In the Due Process Hearing Request, the Mother asked for reversal of (a) the determination by the School System that Student's behavior, which lead to disciplinary action against Student, was not a manifestation of Student's disability and (b) denial of a request for an independent educational evaluation ("IEE") by a psychiatrist chosen by Student's Mother. The School System responded by filing its own Due Process Hearing Request defending its decision not to provide an independent educational evaluation. On May 19, 2004, a Due Process Hearing was convened to consider the School System's Due Process Hearing Request. This Administrative Law Judge found that the Mother was entitled to an IEE performed by a psychiatrist chosen by the Student's Mother and dismissed the Due Process Request filed by the School System.²

On August 3, 2004, a Due Process Hearing was convened to consider the Due Process Hearing Request filed by Student's Mother. Counsel for the parties announced their agreement on some issues and

On March 4, 2004, Student accused a teacher of hitting him.¹³ On March 8, 2004, the middle school principal suspended Student for remainder of school year for "reporting that he was assaulted by a teacher when no such activity took place."¹⁴ On March 12, 2004, an IEP Team conducted a manifestation hearing to determine the need for a functional behavioral assessment and to make an alternative school placement.¹⁵ The Student's Mother requested an independent educational evaluation ("IEE") by Dr. Brian Bonfardin and Mother-Child Services at no cost to Student or Student's Mother.¹⁶ The IEP Team did not order an IEE, and over the objection of Student's Mother, the IEP Team determined that Student's behavior was not a manifestation of Student's disability, agreed to conduct a functional behavioral assessment and maintained the current behavior plan.¹⁷

Following the IEP Team determination that Student's behavior was not a manifestation of Student's disability, the School System disciplinary hearing authority (DHA) recommended that Student be suspended for ten days with an interim placement in the alternative school pending action on the request from Student's Mother for an IEE and a functional behavior assessment.¹⁸ On March 18, 2004, the Director of Pupil Services for the School System refused Mother's request for an IEE as "premature due to the fact that the last evaluation completed for [Student] is three years old."¹⁹

On March 26, 2004, Student's IEP Team met and devised an Assessment Plan for Evaluation that included an "IEE - to be determined for assessing behavior including personality, factors, and maturity level."²⁰ Student's Mother agreed to the assessment plan only if the IEE included an evaluation of Student's behavior, performance and socialization.²¹ On March 29, 2004, the Director of Pupil Services provided to the Mother the Alternative School policies, including those related to behavior.²² On March 30, 2004, the Student's Mother renewed the request for an IEE by Dr. Bonfardin.²³

On March 31, 2004, Student enrolled in the School System Alternative Program located at an elementary school.²⁴ The Director of Pupil Services provided Student's Mother an updated list of evaluators approved by the School System to provide an IEE. The list did not include Dr. Bonfardin's name.²⁵

The Student's Behavior

The Student was initially certified for special education in 1998 as "Learning Disabled." After a reevaluation in 2001, the Student's certification was changed to "Other Health Impaired" due to difficulties associated with bipolar disorder and attention deficit hyperactivity disorder. Between April 8 and May 11, 2004, the school psychologist conducted a psychological evaluation as part of a reevaluation process due to significant behavioral difficulties.²⁶ He continued having "difficulties in reading and math and much difficulty working independently. Absenteeism and manipulative behaviors affected his functioning. Peer interactions were limited."²⁷

requested that the case be rescheduled to October 7, 2004. This Administrative Law Judge found that the Student's behavior, which lead to disciplinary action against Student, was a manifestation of Student's disability and ordered that all records of the disciplinary action and the manifestation determination by the School be expunged from Student's records, that an IEP Team meeting be convened to consider all evaluations and assessments, to design an appropriate IEP with appropriate aids and supports and to determine an appropriate educational placement.³

Following an IEP Team meeting on September 3 and 10, 2004, the parties disagreed whether the School should provide psychological services to the Student and the Student's Mother as a related special education service. On October 7, 2004, the Due Process Hearing on the Due Process Hearing Request filed by Student's Mother was reconvened on October 7, 2004, to determine that sole remaining issue.

The record consists of testimony presented at the Due Process Hearing conducted on October 7, 2004, stipulated facts and 55 stipulated exhibits.

FINDINGS OF FACT

Summary of the Student's Special Education.

The Student had been prescribed psychotropic medications for five years for problematic behavior.⁴ In 2000, the Student had attendance problems and was retained in second grade. A school psychologist observed multiple depressive symptoms and stated that the Student "frequently appeared unhappy, entered school crying and cried in class. He stated he wanted to be at home with his mom."⁵

In the 2001-2002 school year, Student attended third grade in a regular classroom setting. Following Student's last evaluation in November, 2001, the IEP team changed basis of student's eligibility from "learning disabled" to "other health impaired" (bipolar and ADHD) and found that Student's "school behaviors are not extreme enough at this time to warrant emotional cert."⁶ Student attended the same elementary school in fourth grade during the 2002-2003 school year.⁷ The Student had problems with attendance, behavior, particularly temper tantrums, and noncompliance with school work in the fourth grade.⁸

On May 15, 2003, an IEP Team developed an IEP for the 2003-2004 school year.⁹ Student's IEP did not include a functional behavioral assessment, behavioral plan or behavior goal sheet.¹⁰ In the 2003-2004 school year, Student attended fifth grade in a regular classroom setting in a middle school.¹¹ On February 24, 2004, an IEP Team added a behavior plan to Student's IEP, but no behavior goal sheet was added to the IEP.¹²

The Student reported "poor treatment" by his father to the school psychologist including repeatedly being punched in the stomach by his father's fist since he was a young child. He reported that he no longer sees his father. The Student reported fighting with other children, and he reported that he decided over winter break, 2003-2004, not to work anymore because he was angry with a teacher. The Student made threatening remarks about teachers and other students. The Student admitted pressing erasers on his face to simulate finger marks and accusing a teacher of hitting him because that teacher "ticked me off that very day." This incident resulted in the school principal suspending him for the rest of the school year. The Student made other remarks about teachers, children, relatives and neighbors that became increasingly illogical.²⁸

Teachers reported escalating behaviors after mid year. One teacher noticed that his behavior changed when his mother's work schedule changed, and that he made statements about wanting to be suspended so he could stay home with his mother.²⁹ After the Student was assigned to the Alternative School, his teacher made some positive observations about his behavior, but also observed that the Student "uses abusive language and talks about hurting people he thinks have wronged him." She observed that he complains of aches and pains and has vomited deliberately so his mother will come to get him.³⁰

The school psychologist administered the WISC-N, an intelligence functioning measure, which revealed responses to be in the deficient range. However, the school psychologist did not think the scores were a valid measure, "but reflect his current behavioral and emotional difficulties."³¹ The school psychologist also administered the Behavioral Assessment System for Children ("BASC"). Two of the Student's teachers completed Teacher Rating Scales placing the Student in the clinically significant range in several categories.³² The school psychologist concluded, "Behavioral difficulties have had an impact on his skill development." The school psychologist also stated that the Student "has engaged in manipulative behavior that is counterproductive, attempting to exercise control when he does not want to do something."³³ The Student exhibited difficulty with working memory and processing speed when under pressure of the testing situation, had difficulty thinking clearly and efficiently. At the time of the evaluation, the school psychologist found that the Student is "so focused on revenge that he does not consider that he may be mistaken about the situation or that he harms himself or others through his actions."³⁴ The school psychologist recommended that the Student needs a structured environment with clear behavioral parameters, and consistent consequences. "He also needs coaching to express his needs and feelings in an appropriate manner, instead of waiting to deal with angry or hurt feelings until he can no longer contain them."³⁵ The school psychologist recommended further evaluation with a psychiatrist, adding goals and counseling as a related service to the IEP, and stated that the Student's Mother "may find that involvement in counseling or a support group would be helpful to her."³⁶

On May 19, 2004, a Due Process Hearing was convened to consider the School System's Due Process Hearing Request. This Administrative Law Judge found that the Mother was entitled to an IEE performed by a psychiatrist chosen by the Student's Mother and dismissed the Due Process Request filed by the School System.³⁷

On July 27 and 28, 2004, Dr. Brian Bonfardin, a psychiatrist, conducted an independent psychiatric evaluation.³⁸ Dr. Bonfardin found "an intimate relationship" between the physical and verbal abuse by the Student's father and the false allegations against the teacher, which resulted in this due process hearing.³⁹ The Student also displayed recurrent vomiting (with his mother picking him up at school afterward), tearfulness and agitation at school. The Student's mother reported to Dr. Bonfardin that she noticed increasing absenteeism and significant anxiety during times of separation when going to school.⁴⁰

Dr. Bonfardin reviewed the behavioral plan that was developed in February, 2004, and concluded that the "effectiveness of the behavioral plan developed was minimal."⁴¹

Dr. Bonfardin also concluded, "The enmeshment with his mother is global," and gave several examples.⁴² When Dr. Bonfardin interviewed The Student and brought up several problem areas, The Student "began pacing repeatedly" and displayed other signs of nervousness.⁴³ Dr. Bonfardin's diagnostic assessment included a "longstanding difficulty with inhibition," that manifested itself in early childhood "with aggressive temper tantrums, self abuse and impulsive physical aggression."

On August 8, 2004, the parties agreed that additional evaluations would be performed and an IEP Team meeting would be convened to consider all evaluations and assessments, to design an individual educational program with appropriate aids and supports and to determine an appropriate educational placement.⁴⁴

On September 3, 2004, an IEP Team considered the independent evaluation by Dr. Brian Bonfardin and recertified the Student as eligible for special education under the categories of Emotionally Disturbed (primary) and Other Health Impaired (secondary).⁴⁵

The IEP Team reconvened its meeting on September 10, 2004, and developed an Individual Educational Plan (IEP) for the Student, which did not include related psychological services for the Student and the Student's mother. The Student's IEP addressed deficiencies in reading, language arts, math, behavior, and prevocational skills.⁴⁶ Goals and objectives were written for each of these areas and incorporated in the IEP.⁴⁷ A plan for a gradual transition of the Student from the elementary alternative school to his regular middle school was adopted.⁴⁸ The only related service provided on the IEP was an undetermined amount and duration of "counseling services" by the special education counselor.⁴⁹ The Student's Mother objected to the "failure to provide psychological services as a related service."⁵⁰

The Child's Psychology

The Student is five feet five and 3/4 inches tall and weighs 198 pounds.⁵¹ The Student sometimes complains to his mother that his teacher is pushing him too hard at school, but she does not agree. She thinks he works hard at school to complete his school work so that he will not have homework.⁵² Two or three times a week, the Student explodes for an hour or so right after he gets off the bus from school.⁵³ The Student has no group activities outside school, and the Student's only social interaction, except for a 17-year-old cousin who stays with him, is at school.⁵⁴ The Student is anxious about returning to his regular middle school because of changing classes, going to his locker where he has been bullied by other students, going to lunch with a lot of other students, participating in gym class and teachers yelling at him. The Student says that other kids call him "fat" and "dummy."⁵⁵

The Student has had extensive contact with mental health professionals and is prescribed numerous psychotropic medications, including Lithium, Geodan and Ritalin to treat long-standing problems with impulsive behavior, possible bipolar symptoms and ADD.⁵⁶ The Student has exhibited anxiety, aggressive behavior, and inability to attend school, which are consistent with post traumatic stress disorder ("PTSD").⁵⁷ The Student's history of severe anxiety symptoms worsened before he made false accusations against a teacher. Those symptoms included severe gastrointestinal distress, repeated vomiting episodes, tardiness from school, fearfulness, agitation, and self-abusive behavior.⁵⁸

The Student is doing well in the present placement with his current teacher because he feels very safe in a small setting with one teacher who makes him feel safe.⁵⁹ The current placement is the only environment the Student can tolerate at this time. If the Student is placed in a situation in which he is going from classroom to classroom and dealing with a wide variety of people in positions of authority, the Student will not be able to handle those transitions.⁶⁰ It is likely that the anxiety with physical symptoms will return in a less restrictive setting. Children engage in the kinds of behavior that resulted in the Student's discipline and this due process hearing because it gets them out of a social setting that provokes anxiety. When the anxiety with physical symptoms from a less restrictive setting returns, so will the high-risk behavior.⁶¹

The group counseling provided by the School is not an appropriate setting for disclosing traumatic events.⁶² Psychotherapy is the only effective treatment for children suffering PTSD. The benefit to the child is to help the child make sense of what happened and why.⁶³ The Student's ability to do well in a "very enclosed classroom" with very few people is a function of this social withdrawal. Psychotherapy will assist the Student in understanding the trauma and dealing with avoidance and social withdrawal. The

therapy should involve the Student's Mother, not only to provide history, but also to help implement behavioral plans, therapeutic interventions, and to help reintegrate the child into the social arena.⁶⁴

The Student has developed an "enmeshed relationship" with his Mother, which is generally healthy, but the Student has developed the ability to manipulate the Mother and these manipulative skills are being used on teachers in the classroom.⁶⁵ The enmeshed relationship also interferes with the Student's ability to participate in the classroom community because he is not given access to freedom and his peers. Both the Student and the Student's mother need to receive psychotherapy interventions because the Student will likely lose any progress if the dynamics between the Student and the Student's Mother do not change.⁶⁶ The Student's Mother must learn different coping skills than those she has developed, or the Mother's response to the Student's behavior will affect the Student's adjustment in school, especially when he transitions to regular school, undermining any progress the Student makes at school through the Student's psychotherapy alone.⁶⁷

The goal of psychotherapy for the Student is reinvolve the Student in the educational process in a classroom setting and help the Student deal with people of authority without acute episodes of anxiety while at school.⁶⁸ Without psychotherapy to deal with social withdrawal and resolve the traumatic events that occurred, the Student will be unable to participate in a large classroom in which a person in a position of authority places demands on him, and the Student will not be able to participate in a peer group in social activities in a school setting because his anxiety level will be too great.⁶⁹

Psychotherapy for the Student's PTSD requires the use of a qualified therapist to find out exactly what happened, which can be handled by most master-level psychotherapists.⁷⁰ Depending on the skill of the therapist, ability of the family to comply and participation of the Student's Mother, weekly basic psychotherapy – not seeking to effect a personality change – might be effective in four to five months, the minimum psychotherapy required for the Student is that which will find out what happened to Student, teach the Student to relax and reintegrate into a regular classroom and social settings in a regular school without regressing to behavior like that which resulted in these due process proceedings.⁷¹ Such psychotherapy of both Student and Student's Mother for the enmeshment issue might require as few as five to six sessions.⁷²

The Student's Functional Behavior Assessment and Behavior Intervention Plan are too narrowly focused on the Student's anger outbursts rather than inattention, anxiety symptoms and hyperactivity.⁷³ The plan also failed to address difficulty in tolerating people in positions of authority. The plan should describe how staff should respond if symptoms flare up.⁷⁴

CONCLUSIONS OF LAW

Introduction.

The Individuals with Disabilities Education Act ("IDEA")⁷⁵ requires that Tennessee, as a recipient of federal assistance thereunder, ensure that each disabled student in the state receive a "free appropriate public education."⁷⁶ ("FAPE".) IDEA mandates that participating states provide such education for all children "regardless of the severity of their handicap."⁷⁷ In pertinent part, the Act defines a free appropriate public education as:

... special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, and (D) are provided in conformity with the individualized education program⁷⁸ The term "related services" includes "such developmental, corrective and other supportive services (including ... psychological services, ... social work services, counseling services ...) as may be required to assist a child with a disability to benefit from special education...."⁷⁹ Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (IEP).⁸⁰ The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive.⁸¹ An IEP is "more than a mere exercise in public relations;"⁸² indeed, it is the "centerpiece of the statute's education delivery system for disabled children."⁸³

When an IEP is challenged, the inquiry is whether the IEP is reasonably calculated to enable the child to receive an educational benefit.⁸⁴

Psychotherapy as a Related Service.

34 C.F.R. §300.24 and *Tenn.Comp.R.&Regs.* §0520-1-9-.01(46)(a)(9), federal and state regulations promulgated pursuant to IDEA, define "related services" to include, among other things,

(b) Individual terms defined. The terms used in this definition are defined as follows:

* * *

- (2) Counseling services means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

* * *

- (7) Parent counseling and training means

- (i) Parents in understanding the special needs of their child;
- (ii) Providing parents with information about child development;
- (iii) Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or

* * *

- (9) Psychological services includes ...

* * *

- (v) Planning and managing a program of psychological services, including psychological counseling for children and parents.⁸⁵

The U.S. Department of Education, Office of Special Education Programs, defined the circumstances in which counseling for a child's parent may be required in *Letter to Dagley*.

In order to determine whether services for a child's parent, such as training or counseling, should be included in a child's IEP, the team developing the IEP must determine that the service is needed in order for the child to receive an appropriate special education or other required related services in the least restrictive environment. Any related services provided for parents must assist the child in developing skills needed to benefit from special education or correct conditions which interfere with the child's progress toward the goals and objectives listed in the IEP. The service could precede the initiation of specially designed instruction to make the child ready for instruction, or the service and the special education could proceed concurrently.⁸⁶

Subsequent court interpretation and application of 34 C.F.R. §300.24(b)(9)(v) has been consistent with *Letter to Dagley*. *Rome School Committee v. Mrs. B*⁸⁷, a school district's special education program must include psychological services if a learning disabled child's emotional disturbances interfere with his ability to learn; *Trail Regional School District v. D.*⁸⁸; see, *Robb v. Bethel School Dist.* #403.⁸⁹

Least Restrictive Environment

34 C.F.R. §300.550(b)(1) requires that "to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled." See, *Hendrick Hudson District Bd. of Educ. v. Rowley*⁹⁰, IDEA requires that children with disabilities be educated with children who are not disabled "whenever possible."

Tenn. Comp. R. & Regs. 0520-1-9-.01(35) provides that "Least Restrictive Environment (LRE)" means: (a) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children without disabilities; and (b) Special classes, separate schooling or other removal of children with disabilities from the general educational environment occurs only if the nature or severity of the disability is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily.

To place a child in a more restrictive setting, a school system must prove that the child cannot receive educational benefit in a less restrictive placement.⁹¹ The relevant test is defined by the Sixth Circuit:

In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.⁹²

The burden of proof to demonstrate through competent evidence that the specific facts of a restrictive environment case rests on the party who supports the more restrictive setting.⁹³

In *Oberti v. Board of Education*,⁹⁴ the court noted that the feasibility of including a child in a regular classroom was "particularly fact-sensitive" and requires expert testimony. Courts have generally stressed expert testimony and the factual record in requiring less restrictive settings. *Liscio v. Woodland Hills School Dist.*,⁹⁵ rejected a contention that child should be placed full time in a less restrictive class because of evidence of failure to make academic progress there and interference with education of other children. Courts have also stressed specific facts and testimony in requiring more restrictive settings for particular children; e.g., *Chris C. v. Gwinnett County School Dist.*⁹⁶

One of the facts that almost always impacts on the appropriateness of a more restrictive environment is whether, and to what extent, placement in a more or less restrictive environment poses potentially harmful effects on the child or the quality of educational services.⁹⁷ In *Mallory v. Drake*,⁹⁸ the Court considered the potential harmful effect of a child's adopting undesirable behaviors from being constantly exposed only to other disabled children and held that the child should be able to model behavior on children with less severe disabilities.

In this case, Dr. Brian Bonfardin, the psychiatrist who completed a comprehensive independent psychiatric evaluation of the Student⁹⁹, was the only psychiatrist to testify at the Due Process Hearing.¹⁰⁰ The Student's elementary alternative school teacher and the director of special education also testified.¹⁰¹ While the testimony of the teacher and director was helpful in informing the Administrative Law Judge about the Student's educational history, conduct and behavior, neither of these witnesses possesses the qualifications requisite for a foundation from which to form an opinion regarding the need for related psychological services for the Student and the Student's Mother. The only other witness was the school psychologist, who was qualified to – and did – recognize the need for counseling. The record contains no testimony from the school psychologist regarding the need or appropriateness of psychotherapy for the Student or whether psychotherapy for the Student and the Student's mother is a related special education service necessary for the Student to benefit from special education services delivered in the least restrictive environment. There is no evidence that the school psychologist would have been qualified to render such an opinion.

The elementary alternative school placement provided the Student by the School is a very enclosed classroom with very few people. This is a much more restrictive environment than the regular middle school, where the Student's age-level peers attend classes.¹⁰² Psychotherapy is the only effective treatment for children, who, like the Student, suffer PTSD. Psychotherapy will enable the Student to make sense of the trauma he has suffered and why.¹⁰³ The Student's ability to perform in a restrictive environment

is a function of his social withdrawal. Without psychotherapy to deal with social withdrawal and resolve the traumatic events that occurred, the Student will be unable to participate in a large classroom in which a person in a position of authority places demands on him, and the Student will not be able to participate in a peer group in social activities in a school setting because his anxiety level will be too great.¹⁰⁴ Psychotherapy will assist the Student in understanding the trauma and dealing with avoidance and social withdrawal.¹⁰⁵ The Student's Mother must learn different coping skills than those she has developed or the Mother's response to the Student's behavior will affect the Student when he transitions to regular school, undermining any progress the Student might make at school through psychotherapy for the Student alone.¹⁰⁶

The Student's placement in an elementary alternative school is not the least restrictive environment. Without psychotherapy, the Student cannot tolerate a regular middle school environment.¹⁰⁷ Psychotherapy is necessary in order for the Student to receive an appropriate special education in the least restrictive environment. Psychotherapy for the Student's Mother will assist the Student in developing skills needed to benefit from special education and correct conditions which interfere with the child's progress toward the goals and objectives listed in the IEP.

Qualifications to Provide Psychotherapy

An appropriate education, FAPE, is an education provided by qualified personnel.¹⁰⁸ *Tenn. Comp. R. & Regs.* 0520-1-9-.01(45) provides that "Qualified Personnel" means individuals who have met State approved or recognized certification, licensure, registration, or other comparable requirements that apply to the area in which they are providing special education or related services.

Psychotherapy for the Student's PTSD requires the use of a qualified therapist. Most master-level psychotherapists would be qualified to handle the therapy sessions.¹⁰⁹

Failure to Give Prior Written Notice


The School's failure to provide a proper Prior Written Notice stating the reasons for its refusal to include psychological services to the Student and the Student's Mother may amount to a technical violation of the procedural safeguards required by IDEA, but this Due Process Hearing was already pending and the Mother knew the School was not going to include psychotherapy for her and the Student before, during and after the IEP Team meeting. The failure to give notice did not affect the procedural rights of the Student or Mother. Further, this issue is pretermitted by this Administrative Law Judge's decision on the merits of Petitioner's claim.

Cost of Psychological Services

A free education, FAPE, under IDEA is an education that is "provided at public expense." Because psychotherapy for the Student and the Student's Mother is mandated by IDEA, the cost of such psychological services shall be borne by the School.¹⁰⁹

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, the Student and the Student's Mother, who are the prevailing parties in this due process hearing, are entitled to psychotherapy as related services within the meaning of IDEA.



JOHN W. CLEVELAND
Administrative Law Judge

ENDNOTES

No. 04-24

1. 20 U.S.C. §1232(g).
2. *See*, FINAL ORDER REGARDING INDEPENDENT EDUCATIONAL EVALUATION entered June 7, 2004.
3. *See*, AGREED INTERIM AGREED ORDER entered September 7, 2004, *nunc pro tunc* for August 4, 2004.
4. Exhibit 52.
5. Exhibit 11.
6. Transcript 3.
7. Transcript 4.
8. Exhibit 52, p. 7.
9. Transcript 5.
10. Transcript 7.
11. Transcript 6.
12. Transcript 8.
13. Transcript 9.
14. Transcript 10.
15. Transcript 11.
16. Transcript 13.
17. Transcript 12.
18. Transcript 14.
19. Transcript 15.
20. Transcript 16.
21. Transcript 17.
22. Transcript 18.
23. Transcript 19.

24. Transcript 20.
25. Transcript 21.
26. Exhibit 50.
27. Exhibit 50, p. 1-2.
28. Exhibit 50, pp. 3-4.
29. Exhibit 50, p. 2.
30. Exhibit 50, pp. 2-3.
31. Exhibit 50, p. 4.
32. Exhibit 50, p. 6.
33. Exhibit 50, p. 7.
34. Exhibit 50, p. 8.
35. Exhibit 50, p. 8.
36. Exhibit 50, p. 8.
37. *See*, FINAL ORDER REGARDING INDEPENDENT EDUCATIONAL EVALUATION entered June 7, 2004.
38. Exhibit 52.
39. Exhibit 52, p. 1-2.
40. Exhibit 52, p. 2.
41. Exhibit 52, p. 7.
42. Exhibit 52, p. 9.
43. Exhibit 52, pp. 9-10.
44. *See*, AGREED INTERIM AGREED ORDER entered September 7, 2004, *nunc pro tunc* for August 4, 2004.
45. *See*, Eligibility Report, Exhibit 53, dated September 3, 2004.
46. Exhibit 54, p. 2.
47. Exhibit 54, pp. 3-8.
48. Exhibit 54, p. 9.
49. Exhibit 54, p. 10.

50. Exhibit 54, p. 13.
51. Transcript 111-112.
52. Transcript 114-115.
53. Transcript 108-109.
54. Transcript 109-111.
55. Transcript 110-111.
56. The Student had also been prescribed Wellbutrin, Depakote, Seroquel, Lithium, Lithobid, Celaxa and Adderall. Exhibit 52, pp. 4-5.
57. Transcript 80.
58. Transcript 81.
59. Transcript 87-88 & 107.
60. Transcript 88-89.
61. Transcript 83.
62. Transcript 89.
63. Transcript 79-80.
64. Transcript 81-82.
65. Transcript 90.
66. Transcript 91.
67. Transcript 91-92.
68. Transcript 82.
69. Transcript 86-87.
70. Transcript 94.
71. Transcript 101-103.
72. Transcript 93 & 106.
73. Transcript 106.
74. Transcript 106-107.

75. *The Act has been amended and reauthorized since its initial enactment in 1970. This Opinion refers to the original Education of the Handicapped Act, 20 U.S.C. §§400-1485 and all of its amendments, as well as the re-authorization as the Individuals with Disabilities Education Act (IDEA-97), as IDEA.*
76. 20 U.S.C. §1412(1).
77. 20 U.S.C. §1412(2)(C).
78. 20 U.S.C. §401(18).
79. 20 U.S.C. §1401(22).
80. 20 U.S.C. §1401(16).
81. 20 U.S.C. §§1401(19) (defining IEP), §1414(a)(5) (requiring an IEP).
82. *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 565, 570 (11th Cir. 1983), vacated in part on other grounds, 468 U.S. 213, 04 S.Ct. 581, 82 L.Ed.2d 880 (1983), reinstated in relevant part, 740 F.2d 902 (1984), cert. denied, 469 U.S. 228, 05 S.Ct. 228, 84 L.Ed.2d 65 (1985).
83. *Honig v. Doe*, 08 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988).
84. *See, Knable ex rel. Knable v. Bexley City School District*, 238 Fed.3d 755 (6th Cir. 2001).
85. 34 C.F.R. §300.24; *Tenn. Comp. R. & Regs.* §0520-1-9-.01(46)(a)(9).
86. *Letter to Dagley*, 17 IDELR 1107 (OSEP 1991).
87. 247 F.3d (1st Cir. 2001).
88. 35 F. Supp. 2d 34, 42 (D.Mass. 1999).
89. 308 F.3d 1047, 170 Ed. Law Rep. 492, 2 Cal. Daily Op. Serv. 10,538, 2002 Daily Journal D.A.R. 12,135.
90. 458 U.S. 176, 203 (1982).
91. *Roncker v. Walter*, 700 F.2d. 1058 (6th Cir. 1983), cert. denied, 464 U.S. 864 (1983)
92. *Roncker v. Walter*, 700 F.2d. 1058, 1063 (C.A. 6, 1983).
93. *Springdale School Dist. No. 50 v. Grace*, 656 F. 2d 300, 305 n. 8. 1981-82 EHLR 553:101 (8th Cir. 1981), vacated for unrelated reasons; *Statum v. Birmingham Pub. Sch. Bd. of Educ.*, 20 IDELR 435 (N.D.A. 1993) (in a case where the parent of a student with severe disabilities sought to maintain her daughter's placement in a regular classroom, the burden of proof was on the district, as the party seeking to have the student removed from the regular education environment and transferred to the more restrictive setting of a self-contained program); *Delaware County Intermediate Unit #25 v. Martin K.*, 20 IDELR 363 (E.D. Pa. 1993) (when the IDEA's mainstreaming, or least restrictive environment, requirement is at issue, it is appropriate to place the burden of proving compliance on the public agency responsible for the child's education).

94. 789 F.Supp. 1322, 18 IDELR 951 (D.N.J. 1992).
95. 734 F.Supp. 689, 16 EHLAR 861 (W.D. Pa. 1989).
96. 780 F.Supp. 804, 18 IDELR 710 (N.D. Ga 1991).
97. 34 C.F.R. § 300.552.
98. 616 S.W.2d 124 (Mo.App. 1981).
99. Exhibit 52.
100. Transcript 77-78.
101. Transcript 12.
102. Transcript 81-82.
103. Transcript 79-80.
104. Transcript 86-87.
105. Transcript 81-82.
106. Transcript 91-92.
107. Transcript 83, 87-89 & 107.
108. *See, Evanston Community Consolidated School Dist. Number 65 v. Michael M.*, 356 F.3d 798 (7th Cir. 2004).
109. Transcript 94.
110. 20 U.S.C. §1412(1).